



Paper No. 9

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COPY MAILED**OCT 11 2002****OFFICE OF PETITIONS**

In re Application of
Cheiky, et al.
Application No. 10/022,450
Filed: December 16, 2001
Attorney Docket No. 968-20-022

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DECISION DISMISSING
PETITION

This is a decision on the "Petition for Corrected Filing Receipt" filed September 3, 2002, requesting that the above-identified application be accorded a filing date of December 14, 2001, rather than the presently accorded filing date of December 17, 2001. This petition is properly treated under 37 CFR § 1.10(d).

Petitioner maintains that the above-identified nonprovisional application was deposited in the United States Postal Service (USPS) Express Mail Service on December 14, 2001, in accordance with 37 C.F.R. § 1.10, and thus, is entitled to a filing date of December 14, 2001. In support of the petition, petitioner submits:

- a copy of the application transmittal bearing the "Express Mail" mailing label number, EL307478544US;
- a copy of "Express Mail" mailing label EL307478544US, showing a "date-in" of December 16, 2001;
- copies of the "Express Mail" mailing labels for two related applications showing a "date-in" of December 14, 2001;
- copies of the three letters reporting the filing of the three related applications purportedly mailed to the assignee on December 14, 2001; and
- the declaration of patent attorney Marvin Jacobs.

Paragraph (a) of 37 C.F.R. § 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See §1.6(a) (Emphasis supplied).

Paragraph \$1.10(d) provides that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

Petitioner has not made a showing that the instant petition was filed promptly within the meaning of \$ 1.10(d)(1). Furthermore, petitioner's evidence has been considered and is not found persuasive that the requested filing date of December 14, 2001 is the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. The application transmittal submitted on petition is a true copy of the transmittal of record. Both bear the relevant "Express Mail" mailing label number, EL307478544US, and thus, show that this number was placed on the correspondence prior to the original mailing, satisfying \$ 1.10(d)(2).

However, a review of the "Express Mail" mailing label reveals that it shows a "date-in" of December 16, 2001, not December 14, 2001. Likewise, the USPTO's USPS Express Mail Information Database shows that the package mailed under this "Express Mail" number was accepted by the USPS at 5:00 pm on December 16, 2001 (copy enclosed). Petitioner has not submitted evidence that corroborates their claim of deposit of December 14, 2001. Petitioner's showing that other related applications purportedly deposited the same day were given a "date-in" of December 14, 2001, is not persuasive that the USPS erred in entering the "date-in" on the "Express Mail" mailing label for the instant application. Petitioner has not submitted evidence from the USPS acknowledging an error in entering the "date-in." The best evidence that the three applications were deposited in a "Express Mail" drop box on December 14, 2001 is a properly prepared log. Petitioner has not submitted an excerpt from a log book prepared within one business day after the deposit showing the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and

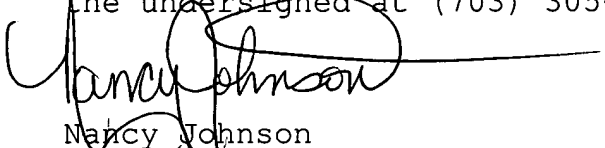
the date and time of entry in the log. The letters to the assignee dated December 14, 2001, stating that the application had been mailed today do not contain the specificity of information that warrants a log to be considered corroborative of a claim of date of deposit¹. As the letters do not contain such information as the date, time and place of deposit, such letters can be written with the intention that such an action have occurred, but without actual corroboration that such action had occurred. Considering all of the evidence, it is concluded that petitioner has not made the showing required pursuant to § 1.10(d)(3) to accord the application a filing date of December 14, 2001.

The evidence shows at most that the application was deposited in "Express Mail" as of December 16, 2001, and thus, is entitled to at least an earlier filing date of December 16, 2001.

The petition is dismissed without prejudice to reconsideration upon a timely showing that the petition was filed promptly within the meaning of § 1.10(d)(1) and a timely submission of corroborating evidence within the meaning of § 1.10(d)(3). A two (2) month nonextendable period is set for reply. See § 1.181(f).

The application is being forwarded to the Office of Initial Patent Examination for correction of the filing date to December 16, 2001.

Telephone inquiries regarding this matter should be directed to the undersigned at (703) 305-0309.



Nancy Johnson
Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

¹ Such corroborating must be shown to have come into being after deposit and within one day after the deposit of the correspondence as "Express Mail." Additionally, when such correspondence is in the form of an excerpt from a log book, the log book should contain information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log.